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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-481

3,317.39 ACRES OF LAND, MORE OR LESS, IN JEFFERSON COUNTY, ARKANSAS; AND EARL MOORE, ET AL., AND UNKNOWN HEIRS (TRACTS 1301E 1-6, 1304, 1304E; ARK-MO. FARMS, INC.),

Petitioners

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eight Circuit in this proceeding, which judgment became final on July 16, 1971.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit appears in the Appendix hereto. It is reported at 443 F. 2d 104 (8th Cir. 1971).

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on May 27, 1971. It became final on July 16, 1971, when Petitioners' timely petition for rehearing was denied. This petition for certiorari was filed within ninety days of the latter date. This Court has jurisdiction under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether the Just Compensation Clause of the Fifth Amendment to the Constitution of the United States requires the United States to justly compensate a landowner when only part of a tract is taken and remaining land is diminished in value?

2. Whether evidence of damages incidental to the taking and a specific project the land was taken for is properly admissible to prove the value of the land remaining after a partial tract has been taken by the Government?

3. Whether a landowner must proceed under the Tucker Act for damages caused by a partial taking to the remainder of his land?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in pertinent part:

> "nor shall private property be taken for public use, without just compensation".

33 U.S.C.A. §702 (c) states in pertinent parts:

> "No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place".

STATEMENT OF THE CASE

The United States of America, Respondent herein, took by condemnation proceedings from the Petitioners, flowage easements over 1947.13 acres of land and the fee title to 13.06 acres of land. The flowage easements and 13.06 acres of land were taken from a farm of approximately 10, 000 acres. The land was taken in relation to the Arkansas River Project.

The case was tried to a jury in the United States District Court for the Eastern District of Arkansas, Pine Bluff Division, The Honorable Oren Harris, presiding, which had jurisdiction under 28 U.S.C. §1291. The jury returned a verdict finding that $976,071.00 was just compensation for the land taken. This verdict was less than the appraisals of the landowners' experts, which ranged from $1,184,195.00 to $1,500,000.00.

In proving the value of the taking, and damages incidental thereto, the landowners' experts applied the before and after rule to determine the damage to the whole of the farm.

The competent record evidence proves that the subject land was best suited for farming (T.286, T.329, T. 367), especially soy beans (T.77). The evidence reflects that before the taking, high water would be off the land by March of each year, in plenty of time to plant soy beans in April or May (T.194). The value of farm land, therefore, is dependent upon when crops can be planted and this is dependent upon when the high water recedes. Between 1930 and 1965, crops could have been planted on this subject land during the normal planting season (T. 194).

The taking, as described above, of the subject land, which was adjacent to the Arkansas River and above Lock & Dam No. 2, occurred on December 9, 1966. In 1968, before Lock & Dam No. 2 was in operation, the land flooded as was normal, but the water began to go down in April. Before the flood water completely receded from the land, the gates of Lock & Dam No. 2 were closed for the first time and immediately the water began to rise and stayed on the land until July 17, 1968 (T.441). The land also flooded until early July in 1969. In both years, approximately 4,000 acres more than was taken was flooded for a longer duration than normal. The evidence reflects that the increased flooding was caused by the operation of the Arkansas River Project.

The landowners' appraisers had knowledge of the increased flooding of the land when they appraised it to find an aftertaking value.[1] It was their opinion that the increased flooding made the land less valuable for farming because there was an uncertainty as to when or whether the farmer would be able to plant his crop. Because of this, the professional appraisers concluded that the market value of the remaining land, i.e., what a willing buyer would pay and what a willing seller would accept, was diminished in excess of $1,000,000 from what the land would have sold for had the Arkansas River Project not been in effect and had not part of the tract been taken.

On appeal the government argued that the above cited evidence was improperly admitted because it had the effect of an impermissable counterclaim and that the

[1]Mr. Payne and Mr. Clifton, government appraisers, testified that they relied on Mr. Henson's calculations as to the amount and duration of flooding of the farm. (T.515-516, 529) Mr. Henson's calculations were in conflict with Mr. Bailey's, another engineer with the Corps, and were not borne out by the facts, i.e., that the land flooded for a longer period of time and to a greater extent because of the project than Mr. Henson calculated it would.

landowners must proceed under the Tucker Act. The landowners argued that the evidence was proper because it was one of the elements taken into consideration by the appraisers when determining the value of the land remaining after the partial taking. The Court of Appeals held that the landowners' remedy was under the Tucker Act.

On Petition for Rehearing the Petitioners argued that the Court failed to apply the rule of *Bauman* v. *Ross*, 167 U.S. 548, 574, that the value of the part taken in the proceedings is not the sole measure of compensation or damages to be paid to the owner, but the incidental injury or benefit to the part not taken is also to be considered, so that when the part not taken is left in such shape or condition as to be itself of less value than before, the owner is entitled to additional damages on that account. The Petitioners also argued that the Court erred in holding that the testimony of the floodings of land in addition to those described in the Declaration of Taking, which was a direct result of the use of the land taken and the project, has the effect of increasing the Declaration of Taking or permitting a counter-claim, and that the landowners' only relief is under the Tucker Act, thereby causing a multiplicity of suits. Additionally, the Petitioners argued that the Court erred in not applying the before and after rule since only a partial track was taken without setting forth an alternate test to determine just compensation; that the Court incorrectly concluded from the facts that the landowners were asking to recover damages for property not included in the Declaration of Taking; and that the Court did deviate from prior decisions wherein they had held that the before and after rule was applicable.

The Petition for Rehearing was denied without opinion.

REASONS FOR GRANTING THE WRIT

1. The Court has held consistently since *Bauman* v. *Ross,* 167 U.S. 548, at 574, 17 S.Ct. 966, 42 L.Ed. 270 (1897), that when only part of a parcel of land is taken, the value of that part is not the sole measure of compensation or damages to be paid to the owner, but that the incidental injury or benefit to the part not taken is also to be considered. Therefore, when the part not taken is left in such shape or condition as to be in itself of less value than before, the owner is entitled to additional damages on that account. See *United States* v. *Miller,* 317 U.S. 369, at 376, 63 S.Ct. 276, at 281, 87 L.Ed. 336 (1943). The United States Court of Appeals for the Eighth Circuit has followed this rule until the decision in this case. See *United States* v. *Birnbach,* 400 F. 2d 378 (8th Cir. 1968) and *Boyd* v. *United States,* 222 F.2d 493 (8th Cir. 1955).

The courts have applied the *Bauman* rule by accepting testimony from expert witnesses as to the value of the land before the taking and the value of the land after the taking. The best evidence of these values is what a willing buyer would pay a willing seller for the land before part of it was taken and after part of it was taken. *United States* v. 3698.63 *Acres of Land,* etc., 416 F.2d 65, 67-69 (8th Cir. 1969).

The evidence of the increased flooding of the remainder of the land after the taking was presented to prove why the land was not as valuable as it was before the taking. Since the flooding occurred during the planting season, a willing buyer would not pay a willing seller as much for the land as he would if the flooding did not occur because the land is worthless unless crops can be planted on time.

The Court of Appeals held that this evidence was improperly admitted because it is evidence of a taking not set forth in the Declaration of Taking and constitutes a counterclaim which can only be brought under the Tucker Act. By not following *Bauman* v. *Ross,* supra, and the line of cases applying its teachings, the Court of Appeals for the Eighth Circuit has deviated from established precedent and creates a conflict within the Circuits and certiorari should be granted to correct this error.

2. Certiorari should be granted and the Court should on the merits of this case consider and ennunciate the proper elements that can be considered by the jury in proceedings of this sort. If the court does not grant certiorari, then this landowner on retrial, and all other landowners that are faced with similar condemnation proceedings, will be unable to ascertain how to go about proving their damages. On the record below the damages are easily ascertainable because professional appraisers determined what the land as a whole was worth before the taking, and what the land remaining was worth after the taking. The professional appraisers used the best possible test in determining the before and after values, i.e., the fair market value before and the fair market value after, or what a willing buyer would pay a willing seller. However, on retrial an appraiser could not testify to what the fair market value is after the taking or what a willing buyer would pay a willing seller, because the Court of Appeals' opinion is that such evidence cannot be introduced.

If the disputed evidence was considered to be a counterclaim, then the damages would be much more than asked for here, because the landowners would lose their property rights and the Government would have the right to flood the land at will without additional compensation. The Government took all of the land they wanted, or

thought they needed, for proper floodage control. Therefore, since the landowners retained fee simple title to the remaining land without any flowage easement, they are free to build dikes or dams or drainage canals or ditches to improve the land, because the Government has already said that they don't need the remaining land for the Arkansas River Project to operate effectively. If the landowner is forced to try the case piecemeal and proceed in the Court of Claims under the Tucker Act, he must contend that the Government took 4,000 additional acres of land, and we suggest that the Government would resist strenuously this proposition just as they have throughout the proceedings to this point.

The Court of Appeals' reliance on the reasoning of *Oyster Shell Products Corp.* v. *United States,* 197 F.2d 1022, (5th Cir. 1952), cert. denied, 344 U.S. 885 (1952) and the line of cases following it is misplaced because in *Oyster Shell* the landowners filed a counterclaim alleging that all of their property should have been included in the Declaration of Taking filed by the Government. In the instant case, however, the evidence relates to the injury to the remaining land and is not a counterclaim asking the Government to take more land.

Certiorari should be granted to correct this misinterpretation of the law or in the alternative to ennunciate the proper elements to be considered.

3. Certiorari should be granted to determine whether the landowners can properly proceed under the Tucker Act. 33 U.S.C.A. § 702 (c) provides in pertinent part:

> "No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place".

The Court of Appeals held that the landowners must proceed under the Tucker Act but in view of this statute and the cases interpreting it, it is questionable whether such proceedings would be proper. See *National Manufacturing Co.* v. *United States,* 210 F.2d 263 (8th Cir. 1954); cert. denied 74 S.Ct. 778, 347 U.S. 967, 98 L.Ed. 1108; *Parks* v. *United States,* 370 F.2d 92 (2nd Cir. 1966); *Stover* v. *United States,* 332 F.2d 204, 206 (9th Cir. 1964) cert. denied, 379 U.S. 922, 85 S.Ct. 276, 13 L.Ed. 2d 335 (1964); *Clark* v. *United States,* 218 F.2d 446 (9th Cir. 1954).

CONCLUSION

The writ of certiorari should be granted to review the judgment of the United States Court of Appeals for the Eighth Circuit. After a full hearing, that judgment should be reversed and the judgment of the United States District Court should be reinstated.

Respectfully submitted,

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APPENDIX 1A

United States Court of Appeals,
Eighth Circuit

UNITED STATES of America,
Appellant,

v. No. 20467

3,317.39 ACRES OF LAND, MORE OR LESS, IN JEFFERSON COUNTY, ARKANSAS, and Earl Moore et al., Appellees.

May 27, 1971.

MEREDITH, Chief District Judge.

This is an appeal by the Government from a judgment in a condemnation proceeding tried before a jury. The jury awarded the landowners $976,071 as just compensation. The Government by its declaration of taking took title in fee to 13.06 acres and flowage easements of 1,947.13 acres out of a tract of land of approximately 10,000 acres, in connection with the construction Lock and Dam No. 2 of the Arkansas River Project.

The issue presented by this appeal is whether, in a condemnation proceeding, the district court had jurisdiction to permit the landowners to introduce evidence relating to alleged flooding beyond the area described in the complaint and declaration of taking.

The date of taking was December 9, 1966. The evidence below in behalf of the landowners showed the value on the entire tract at approximately $350.00 per acre before the taking and the damage caused by the taking

ranged from $123.00 per acre to $150.00 per acre for the entire tract. The basis for the damages, as testified to by the landowners' appraisers over the objection of the Government, was that up to 4,000 acres of land, in addition to the approximately 2,000 acres taken, occasionally would be flooded by the Project. The landowners' damage, according to their witnesses ranged from $1,184,195 to $1,500,000.

The Government witnesses testified that the damage to the tracts in question caused by the taking in fee and the flowage easements amounted to from $110,000 to $116,000.

Upon completion of the testimony, the Government moved for a directed verdict on the grounds that the landowners' appraisals were not supported by any probative evidence, because they were not limited to the land described in the declaration of taking. The Government also objected to one of the instructions given by the Court to the jury.

In federal condemnation, where there is a partial taking of a tract, just compensation includes not only actual value of the part taken, but also depreciation in the value of the remainder resulting from the taking of part of it. As stated in Bauman v. Ross, 167 U.S. 548 at 574, 17 S.Ct. 966, at 976, 42 L.Ed. 270 (1897):

> " • • • when part only of a parcel of land is taken • • • the value of that part is not the sole measure of the compensation or damages to be paid to the owner; but the incidental injury or benefit to the part not taken is also to be considered. When the part not taken is left in such shape or condition as to be in itself of less value than before, the

owner is entitled to additional damages on that account."

If the taking in and of itself renders the remainder less valuable than before, the owner is entitled to additional compensation. Conversely, if the partial taking increases the value of the remainder, the benefit may be set off against the value of the land taken. United States v. Miller, 317 U.S. 369, at 376, 63 S.Ct. 276, at 281, 87 L.Ed. 336 (1943). This is called severance damage.

The nature and extent of the interest to be acquired is discretionary with the authorized federal officials. These interests are specified in the complaint and the declaration of taking, which may not be increased or decreased by the courts. Berman v. Parker, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954); Wilson v. United States, 350 F.2d 901 (10th Cir. 1965); United States v. Brondum, 272 F.2d 642 (5th Cir. 1959); Burkhart v. United States, 227 F.2d 659 (9th Cir. 1955); Simmonds v. United States, 199 F.2d 305 (9th Cir. 1952); United States v. Kansas City, Kan., 159 F.2d 125 (10th Cir. 1946); United States v. Sunset Cemetery Co., 132 F.2d 163 (7th Cir. 1942). See also United States v. Miller, supra; United States v. Birnbach, 400 F.2d 378 (8th Cir. 1968).

The result of permitting testimony to be introduced before the jury about flooding of lands in addition to those described in the declaration of taking has the effect of increasing the declaration of taking or permitting a counterclaim in a condemnation suit, which may not be done. Boyd v. United States, 222 F.2d 493 (8th Cir. 1955); Moody v. Wickard, 78 U.S.App.D.C. 80, 136 F.2d 801 (1943); Oyster Shell Products Corp. v. United States, 197 F.2d 1022 (5th Cir. 1952), cert. den. 344 U.S. 885, 73 S.Ct. 184, 97 L.Ed. 685 (1952).

The United States, as sovereign, is immune from suit, except when it consents to be sued, and the terms of its consent to be sued in any court defines that court's jurisdiction to entertain the suit. United States v. Sherwood, 312 U.S. 584, 61 S.Ct. 767, 85 L.Ed. 1058 (1941); Oyster Shell Products Corp v. United States, supra. The terms of the Government's consent to be sued in the facts of the instant case are defined by the Tucker Act, 28 U.S.C. § 1491.

The landowner is entitled to recover damages for the actual taking of property which is not included in the declaration of taking, but the award may not be made in a condemnation suit under the theory of damages to the remainder. This must be done in a separate proceeding under the Tucker Act in the Court of Claims, (28 U.S.C. 1491), United States v. Virginia Electric Co., 365 U.S. 624, 81 S.Ct. 784, 4 L.Ed. 2d 866 (1961; United States v. Kansas City Life Ins. Co., 339 U.S. 799, 70 S.Ct. 885, 94 L.Ed. 1277 (1950); United States v. Causby, 328 U. S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946); United States v. Willow River Power Co., 324 U.S. 499, 65 S.Ct. 761, 89 L.Ed. 1101 (1945); United States v. Chicago, M., St. P. & P. R. Co. 312 U.S. 592, 61 S.Ct. 772, 85 L.Ed. 1064 (1941); United States v. Cress, 243 U. S. 316, 37 S.Ct. 380, 61 L.Ed. 746 (1917); United States v. Welch, 217 U. S. 333, 30 S.Ct. 527, 54 L.Ed. 787 (1910); United States v. Lynah, 188 U. S. 445, 23 S.Ct. 349, 47 L.Ed. 539 (1903); United States v. Williams, 188 U. S. 485, 23 S.Ct. 363, 47 L.Ed. 554 (1903).

This cause will be reversed and remanded to the district court for a new trial. The award shall be limited

to the damages caused to that portion of the property which is included in the declaration of taking, plus incidental damages, if any, caused by that taking to the remainder. It may not include damages to the remainder of the property which as a result of flooding was alleged to have been taken.

Reversed and remanded.

APPENDIX 1B

UNITER STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 20467 September Term, 1970
United States of America Appellant,

vs.

3,317.39 Acres of Land, etc., et al, Appellees.

Appeal from the United States
District Court for the
Eastern District of Arkansas.

The Court having considered petition of appellee for rehearing en banc and, being fully advised in the premises, it is now here ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is now here ordered that the petition for rehearing also be, and it is hereby denied.

July 16, 1971

APPENDIX 1C

AMENDMENT 5 TO THE CONSTITUTION OF THE UNITED STATES

[Criminal actions — Provisions concerning — Due process of law and just compensation clauses.] — No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX 1D

33 U.S.C.A. § 702 (c) provides:

702c. Expenditures for construction work — Conditions precedent — Liability for damage from flood waters — Condemnation proceedings — Floodage rights. — Except when authorized by the Secretary of War [Army] upon the recommendation of the Chief of Engineers, no money appropriated under authority of this Act [§§ 702a, 702b-702d, 702e-702g, 702h, 702i, 702g, 702k, 702*l*, 702m, 704 of this title] shall be expended on the construction of any item of the project until the States or levee districts have given assurances satisfactory to the Secretary of War [Army] that they will (a) maintain all flood-control works after their completion, except controlling and regulating spillway structures, including special relief levees; maintenance includes normally such matters as cutting grass, removal of weeds, local drainage, and minor repairs of main river levees; (b) agree to accept land turned over to them under the provisions of section 4 [§ 702d of this title]; (c) provide without cost to the United States, all rights-of-way for levee foundations and levees on the main stem of the Mississippi River between Cape Girardeau, Missouri, and the Head of Passes.

No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place: Provided, however, That if in carrying out the purposes of this Act [§§ 702a, 702b-702d, 702e-702g, 702h, 702i, 702j, 702k, 702*l*, 702m, 704 of this title] it shall be found that upon any stretch of the banks of the Mississippi River it is impracticable to construct levees, either because such construction is not economically justified or because such construction would unreasonably restrict the flood channel, and lands in such

stretch of the river as subjected to overflow and damage which are not now overflowed or damaged by reason of the construction of levees on the opposite banks of the river it shall be the duty of the Secretary of War [Army] and the Chief of Engineers to institute proceedings on behalf of the United States Government to acquire either the absolute ownership of the lands so subjected to overflow and damage or floodage rights over such lands. (May 15, 1928, c. 569, § 3, 45 Stat. 535).